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ABSTRACT

The first words of the first of the rights guaranteed to Americans in the Bill of Rights are, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Despite the obvious general intent of these words, doubts remain about specific applications of the law. The permissible relationship between religion and education is particularly difficult to define. This document refers to several landmark court cases in providing a general overview of judicial thinking regarding this relationship. The cited decisions cover such topics as the extent to which and the ways in which public funds can support parochial education, the acceptable levels of religious observance in public schools, the rights of parents and students not to participate in public instruction or public school practices on religious grounds, and the degree to which religious beliefs can legally influence the public school curriculum. (Author/PGD)

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Introduction

What pattern of state-church relationships in the area of education will best serve the interests of American society in today's changing political climate?

This fastback examines those aspects of the state-church relationship that have generated controversy at federal, state, and local levels, including financial aid for nonpublic schools and their clientele and the role of public schools in teaching religion.

Relations between the state and the churches have posed problems for societies ever since the secular and spiritual powers became distinct entities. As a result of the separation, differing claims were made on the individual's ultimate loyalty. Even in the United States there has been much controversy over the appropriate relationship between the civil and the clerical authorities. Disagreements and disputes have centered around such issues as tax exemption for church business activities, the nature of the marital relationship, abortion and birth control, church use of public property, legislating morality, and taxation in support of church programs. Today it is in the area of schooling that the controversies are the most frequent, the most litigious, the most enduring, and the most given to legal and political machinations. The education arena has become the scene of so much state-church controversy largely because some of the involved parties see the school as an important vehicle for gaining the support and loyalty of the young.

The American public school owes its existence to the belief that education is essential to the well-being of a democratic society and that such schools are necessary to promote the sense of community so important in a nation whose inhabitants come from such diverse backgrounds. Much of

the rationale behind the nineteenth-century legislation establishing compulsory schooling came from the desire to encourage patriotism and to Americanize the immigrant. At the same time, some churches desirous of promoting their faith saw fit to open their own schools. Other churches, concerned over growing secularism and fearing a loss in number of the faithful, have taken the same action during the last century and a half. Some churches had controlled schools in Europe and sought to re-create in America conditions that had existed in "the old country." Members of other churches today object not to the concept of the public school but to what they interpret as inappropriate values being fostered in those schools. They seek to prevent objectionable materials from being used and objectionable topics from being studied in the schools. Still others — the Old Order Amish — object to sending their children to any school beyond the elementary grades and age 14.

Changing political conditions have made old religious issues more acute and have given rise to new ones. More people are now being educated in the schools and are staying there for longer periods of time. Consolidation of small or sparsely populated school districts into larger ones has threatened the relative isolation of some people who see their values being challenged or negatively influenced as a result of the greater contact with those holding different values. At the same time, school district consolidation has increased distances between home and school. In many communities public transportation systems have been developed and are often used to deliver children to nonpublic schools. Another effect of the consolidated school is that there are now more youngsters to be influenced, and the larger and now heterogeneous school community calls for conscious efforts to mold the beliefs of the young where formerly these efforts could be left to home and neighborhood.

The greater affluence enjoyed by many Americans has made it possible for them to live considerable distances from where they work, thus bringing values of one culture (for example, urban, cosmopolitan, middle-class, liberal) to an area whose long-time inhabitants hold to quite different beliefs (rural, provincial, conservative). Affluence has also meant additional funds for those desirous of building schools that promote values other than those they believe to be dominant in the public schools. Just as money can put a foundation under a castle in the air, so it can build a

modern school as an annex to the local church. Greater sums of government money have contributed to the greater provision of social services by federal and state agencies. The provisions of the Elementary and Secondary Education Act of 1965 are an excellent example of such services.

Supreme Court Justice Douglas noted that Americans are a religious people. But Americans hold to diverse views about religion and its proper role in daily affairs. The U.S. Constitution, furthermore, written by men who wished to avoid the religious strife that had plagued European countries, establishes a secular environment. Our overarching ideals and our laws are grounded in the principle of state-church separation as established in the First Amendment provisions concerning religion. Yet, after nearly two centuries under the Constitution, Americans still have difficulty accepting diversity and seeing themselves in a pluralistic context. While paying lip service to the law, many communities have in practice ignored constitutional proscriptions, yet would be resentful of the charge that they were in violation of the law of the land. This is well exemplified by the unfavorable reactions to the U.S. Supreme Court's 1962 prayer decision. Many school systems have ignored the ruling, preferring to risk the wrath of the courts rather than that of the majority of local citizens.

Persons disinclined to accept even the legal principles of separation and "no establishment of religion" have gained political power in some parts of the country. The result is a changing political climate in which some states provide various forms of financial aid to church schools and others adhere to a strict no-aid view. At the same time, federal courts, following the lead of the Supreme Court, have heard the complaints of individuals and small groups, even when they were counter to majority opinion. Thus Arch Everson, Vashti McCollum, and Madalyn Mays O'Hair have inscribed their names indelibly on the nation's constitutional history as a result of their individual battles, successful and unsuccessful, on behalf of separation of state and church.

The Landmark Legal Decisions Affecting Church-State Relationships

Several U.S. Supreme Court decisions define the limits of reasonable consideration for church-state issues in education. They are summarized here.

Pierce v. *Society of Sisters*, 268 U.S. 510. In 1925 the Court struck down an Oregon law that required attendance at public schools by all children between the ages of 8 and 16. The decision affirmed the right of parents to send their children to nonpublic schools.

Everson v. *Board of Education*, 330 U.S. 1. The Supreme Court in 1947 upheld a New Jersey statute under which parents were reimbursed for the cost of transporting their youngsters to a Roman Catholic high school on buses operated by the public transportation system. The decision rendered publicly financed busing possible for children in states that did not have a constitutional prohibition against such expenditure.

McCollum v. *Board of Education*, 333 U.S. 203. One year after its *Everson* decision, the Court ruled against a Champaign, Illinois, practice whereby church representatives were permitted to come into the public schools during the school day to provide religious instruction. "Separation means separation, not something less," said the Court, and to use facilities maintained with public funds to provide religious instruction was unconstitutional.

Zorach v. *Clauson*, 343 U.S. 306. In 1952 the Supreme Court upheld a "released time" program in New York City whereby some pupils were released early from their public school to attend religion classes away from the school grounds. That the religious instruction was not given in the public schools distinguished this case from *McCollum*. The Court thus

permitted the public schools to cooperate with churches in regard to the religious instruction.

Engel v. *Vitale*, 370 U.S. 421. In a 1962 ruling the Court invalidated the use in New York schools of a prayer composed by the state Board of Regents. Said the Court, "[It] is no part of the business of government to compose official prayers for any group of the American people. . . ."

Abington Township School District v. *Schempp*, 374 U.S. 203. Faced with two cases dealing with Bible reading and prayer recitation, one from Pennsylvania where the practices had been invalidated and one from Maryland where they had been upheld, the Court in 1963 ruled that prayer and Bible reading were religious exercises and, as such, were not permissible in public schools. Legislation with the purpose or primary effect of advancing or inhibiting religion could not stand the test of constitutionality.

Board of Education v. *Allen*, 392 U.S. 236. The Court in a 1968 decision involving the loan of secular textbooks to parochial school pupils upheld such practice as supportive of the secular as distinguished from the religious function of the nonpublic school. The decision was significant because it opened the door for legislation in several states that claimed they were aiding only the secular function of the church schools by lending them textbooks.

Lemon v. *Kurtzman; Earley* v. *DiCenso*, 403 U.S. 602. Ruling in 1971 on cases arising from legislation in Pennsylvania (*Lemon*) and Rhode Island (*Earley*), the Court invalidated several forms of public aid to church schools. These included reimbursement for the cost of teacher salaries, textbooks, and other instructional materials, as well as salary supplements. The Court in these and other cases challenging legislation in several northern states listed areas where aid was impermissible, and set forth a threefold test for constitutionality. Statutes providing aid to nonpublic schools were invalid if 1) their purpose is to advance or inhibit religion, 2) their primary effect is to advance or inhibit religion, or 3) they lead to excessive governmental entanglement with religion.

Wisconsin v. *Yoder*, 406 U.S. 205. In 1972 the Supreme Court supported the Amish in their refusal to comply with the compulsory attendance statutes of Wisconsin. The Court's decision, which exempted the Amish from attending high school, lent little encouragement to other

groups that might seek the same exemption, but it did pose a challenge to a century-old American tradition of compulsory education.

P.E.A.R.L. v. *Nyquist*, 413 U.S. 756; *Levitt* v. *P.E.A.R.L.*, 413 U.S. 472; *Sloan* v. *Lemon*, 413 U.S. 825. In three decisions handed down on June 25, 1973, the Court invalidated aid to nonpublic schools in the form of tuition grants for parochial school pupils, tax benefits, grants for maintenance and repair of parochial schools, and grants to pay for state-mandated services performed in the nonpublic schools. With each ruling the Court was lessening the scope of permissible aid.

Meek v. *Pittenger*, 421 U.S. 349. The Supreme Court in 1975 ruled as unconstitutional a Pennsylvania law that provided nonpublic schools with instructional materials and equipment and a variety of auxiliary services including counseling, testing, psychological services, speech and hearing therapy, and special instructional services for exceptional, remedial, and disadvantaged pupils. By mid-1977 the Court had limited aid to nonpublic schools to textbook loans, provision of standardized tests and scoring devices, diagnostic services on parochial school property, guidance and remedial services outside the schools, and busing.

The First Amendment

Fundamental to the Court's reasoning in the preceding cases is the First Amendment to the Constitution, which states in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These First Amendment prohibitions against Congress were extended to the states by the Fourteenth Amendment. They are often referred to as the Establishment Clause and the Free Exercise Clause.

In delivering the Court's opinion in the *Everson* bus case, Justice Black provided a detailed explanation of the Establishment Clause.

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any

religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Justice Clark, writing the *Schempp* decision 16 years later, offered a new interpretation of the Establishment Clause: If either the purpose or the primary effect of legislation advances or inhibits religion, the enactment is unconstitutional. In a 1970 ruling, Chief Justice Burger added a further test for constitutionality: The legislation could not promote an excessive government entanglement with religion, such as might result from inspection or supervision of parochial school's use of public funds. At this writing, then, under the Establishment Clause public funds for nonpublic schools are unconstitutional if, in the judgment of the Court, the legislation providing for these funds violates any of the above tests for constitutionality.

The Free Exercise Clause has been invoked in school cases concerning Jehovah's Witnesses, the Amish, Bible reading, and religious instruction. As applied most recently in a case involving the Amish, this clause is interpreted as meaning that the government can constitutionally interfere with a person's practice of religion only when the government can show "a compelling interest." Unless the general welfare is endangered by particular religious practices, these practices cannot be prohibited by the state. Furthermore, where the issue is free exercise of religion, the Court has placed the burden of proof on the government.

It has been argued that under the Free Exercise Clause organized prayer in the schools should be permitted. Persons who do not wish to participate could be excused from prayer, thus guaranteeing their free exercise. The Court's rulings in *McCollum* and *Schempp* indicate, however, that "free exercise" does not permit violation of the Establishment Clause. In *McCollum* the Supreme Court declined to deal with the question of an infringement upon the Free Exercise Clause because the practice in dispute was unconstitutional on the basis of the Establishment Clause. Fifteen years later in *Schempp*, the Court reaffirmed this position, finding no constitutional difference between a Bible reading statute that

made participation compulsory and an amended version of the statute that provided for pupils to be excused from the reading. To the charge that by banning prayer the Court was letting the minority rule the majority, the Court pointedly noted that the Free Exercise Clause was never intended to permit the majority to "use the machinery of the State to practice its beliefs. . . ."

Court decisions, of course, do not end controversies. They only resolve issues of law. In some instances they tend to generate controversy. In other situations they spur legislators to do a scissors and paste job on invalidated statutes in order to make them constitutionally acceptable. And in still other cases, the court decisions are deliberately ignored. Finally, the Court has, on occasion, changed its collective mind. One might, therefore, conclude that its rulings provide only temporary guidelines as to the appropriate relationship between the state and the church. This conclusion, however, would not be entirely correct. The guidelines are not temporary; they were established nearly two centuries ago, and their endurance in the face of changing condition. lends considerable credence to their continued applicability.

Proposals concerning financial aid to nonpublic schools and religious practices are, of course, influenced by other factors as well as by the Constitution. While the law serves as one test of the viability of such proposals, political, financial, and administrative concerns must also be considered. Resolving the broad question of state-church relationships involves examining specific issues in light of these tests, and this is what the remainder of this fastback is focused on. The pertinent issues have been grouped into two categories: 1) those concerns that arise from the use of public funds and resources by nonpublic schools, and 2) the effect of religious influences on the policies and programs of public schools and the role of public schools in promoting the religious instruction of the young.

Public Money for Nonpublic Schools

In 1922 a New York court, asked to permit textbooks purchased with public funds to be used by parochial school children on the ground that it was the child rather than the school who would benefit, concluded that a school was more than just a building and its contents; it involved teachers, pupils, and the learning process. Therefore, anything that aided learning was aiding the school, and thus public funds could not be used to purchase instructional materials for nonpublic schools. Seven years later a Louisiana court took a contrary view, contending that the schools themselves received no benefit from the textbooks; the beneficiaries were solely the children. When the U.S. Supreme Court cited the Louisiana decision and supported the purchase of texts for parochial school pupils using public funds, the "child benefit" argument was born. Despite the fact that the case, *Cochran* v. *Louisiana*, made no mention of the First Amendment or the Establishment Clause, *Cochran* was argued as a violation of the Fourteenth Amendment prohibition against depriving persons of private property without due process. (The private property was, of course, money paid in taxes.) The nation's highest court had given the green light to public aid to parochial school children. Even though the depression years of the thirties and the half-decade of involvement in World War II may have precluded taking advantage of the ruling, the years that followed with the massive building programs of several churches provided ample opportunity to make up for lost time. The 1947 *Everson* decision upholding public bus privileges for nonpublic school children in New Jersey only served to reassure advocates of "child benefit" of their strong position in the courts.

The "child benefit" argument is no longer considered good law, if it ever was, for as an Oklahoma court noted, practically every expenditure

for schools aids children. Furthermore, only children affiliated with a nonpublic school could benefit from the laws. Lower court rulings indicate that in a majority of states "child benefit" apparently has never been a decisive argument. But in several states it largely has been responsible for the forms of aid to be discussed in the following pages, and it was widely used to gain congressional support for the 1965 Elementary and Secondary Education Act.

Bus Transportation

In its *Everson* ruling the Supreme Court said that transporting youngsters at public expense to a Catholic high school did not violate the constitution of the state of New Jersey, nor was it in violation of the First Amendment to the U.S. Constitution. No one was guaranteed publicly financed transportation; no state was required to provide it. Subsequent to the Court's ruling, a number of state courts have ruled that while public financing of transportation for parochial school children may not violate the federal Constitution, it does violate the state constitution. Today less than a third of the states require communities to provide children full transportation service to nonpublic schools, and with but two exceptions, all of these states are in the northeast quarter of the country. Several other states provide transportation along public school bus routes only.

The controversy today in regard to transportation results from the practice in several states of providing special transportation benefits to nonpublic school children. Public school pupils are limited to busing service within the school district where they reside. Parochial school pupils, on the other hand, may be bused at public expense outside the school district or even across state borders. The greater distance means a greater expenditure for each nonpublic school pupil. Thus, in late 1975 a U.S. district court struck down an Iowa statute that authorized student transportation across public school district lines, and early in 1977 a similar decision was rendered by a federal judge in a case involving a 1976 Rhode Island law.

The question of whether to transport or not to transport has many complicating elements. State legislation permitting or mandating busing of nonpublic school students may not be accompanied by adequate provision of funds to do so. A public school board may find that compliance with requests for transportation of nonpublic school students may mean that

some existing services have to be lessened or even curtailed. Perhaps the ultimate occurred in Toledo, Ohio, in 1976 when the school system, ostensibly out of money, closed its doors to 56,000 children. While these youngsters were left literally out in the cold, the school system was continuing to provide transportation and other services (for which it was reimbursed only partially by the state) to church-related schools.

An obvious cost factor in student transportation budgets is the price of fuel. Constantly increasing gasoline prices can quickly render the budgetary allocation for transportation inadequate. Reference has already been made to the greater distance likely to be involved in busing nonpublic school children. School district administrators might find that it costs $75 per year to transport a public school youngster and $275 for each parochial school pupil. Although such a discrepancy may not exist in every school district, it is present in some.

These situations cannot be prevented or resolved by efforts to allocate funds equitably according to some formula, such as an across-the-board per capita appropriation for transportation. A school board elected to serve a public school district faces an obvious dilemma when it must apportion some of its funds for nonpublic school use. The issue of aid in the form of transportation, currently estimated at well in excess of $200 million annually, while it may have been resolved from a legal perspective, certainly has not been resolved from a practical one.

Textbooks and Teaching Aids

The constitutionality of loaning secular textbooks to nonpublic school pupils has been an issue for half a century, and for a somewhat longer period some courts have ruled such aid to be in violation of their state's constitution. Except for workbooks and classroom wall maps, the wide variety of supplementary teaching aids now available was all but unknown until the last few decades. These aids thus did not figure prominently in earlier legislation and court decisions. The gift or loan of supplementary classroom materials stems largely, though by no means solely, from the 1965 Elementary and Secondary Education Act (ESEA), and these auxiliary aids tend to receive separate treatment in legal discussions. But in the educational context the various instructional materials are inseparable from one another, and whereas busing is external to teaching, textbooks

and other teaching aids constitute an integral part of the instructional process. In considering the question of what constitutes an appropriate relationship between church and state on the issue of loaning textbooks they are, therefore, treated together.

Reference has already been made to the New York and Louisiana court cases on the issue of aid for textbooks and instructional supplies. That the aid was permitted in one state but not the other is not a contradiction. The Constitution makes education the responsibility of the individual states. Until the passage of ESEA only a few states permitted textbook aid. The New Mexico Supreme Court ruled against the practice in 1951, as did Oregon courts in 1962. It is noteworthy that the U.S. Supreme Court, which a few years later was to approve textbook loans in *Board of Education* v. *Allen*, declined to review the Oregon decision, thereby upholding that state's ban.

In 1965 Congress passed the Elementary and Secondary Education Act, which authorized $100 million annually for "acquisition of school library resources and printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools." While emphasis was placed on the loan of materials to children and the retention of certain audiovisual equipment in the public schools, numerous loopholes were intentionally provided. Encyclopedias, for example, could be put on "permanent loan" in the parochial schools. Movie projectors and television receivers could be allowed off public school premises if they were being used to provide "remedial instruction," a label subject to wide interpretation. The ESEA was worded to enable the U.S. Commissioner of Education to by-pass state governments where questions of constitutionality might be raised and to give the money directly to the parochial schools. (This raises an interesting issue of states' rights which, however, is beyond the scope of this discussion.) Many issues concerning the administration of the funds provided by the ESEA were deliberately left unresolved, thereby permitting some decisions to be made at state and local levels.

The ESEA made hundreds of millions of dollars available to public and nonpublic schools and opened a Pandora's box that released an unending horde of legal issues, constitutional questions, and community tensions. State legislatures, some of which had begun to provide new forms of aid to

church-related schools, saw ESEA as an opportunity to dispense large sums of money with little thought to constitutional implications. A 1963 law in Rhode Island permitting the purchase of textbooks for parochial schools, and a similar statute in New York, were harbingers of what was to come. The *Allen* case arose when two public school boards in New York brought suit to prevent the state commissioner of education from using public funds to provide the textbooks for parochial schools. Although their complaint was upheld by the New York Supreme Court, the school boards eventually lost their fight in the U.S. Supreme Court where, in delivering the Court's judgment, Justice White proposed that there was a clear-cut distinction between the secular and religious functions of the parochial school, and the textbook aid served the secular function only. Little weight was given to the fact that the statute in question did not require that books for nonpublic school pupils be the same as those used or approved for use in the public schools. The nonpublic schools could receive whatever textbooks they wanted as long as their request was approved by a public board of education.

When in 1971 the Supreme Court invalidated several other forms of aid to nonpublic schools, Rhode Island, New Jersey, Pennsylvania, and Ohio set a pattern by turning to large-scale purchases of texts for those schools. Their legislators had already allocated the funds, had already established the precedent. If the Court restricted the types of aid, this could mean the availability of that much more financial aid for textbooks. For example, in its 1975 *Meek* v. *Pittenger* decision, the Court struck down most provisions of a Pennsylvania parochial school aid law. The state legislature then merely doubled the amount of public moneys budgeted for textbook loans to nonpublic schools, since that provision in the law had not been invalidated.

The Court's rationale in permitting public money to be spent on textbooks for nonpublic school students but not on other instructional materials is based on two arguments. First, secular texts are less likely to be used for religious instruction than films, recording and projection equipment, and other visual aids. Second, texts are distributed on a per pupil basis, but materials available in lesser quantities have to be given to the school rather than to the pupil. This constitutes a type of direct aid unlikely to be approved by a federal court.

Is the question for the immediate future, then, limited to the amount of federal and state aid to be provided for textbooks? Certainly there appears to be no question of constitutionality at the federal level. The Supreme Court has ruled that, as with busing, if the textbook loan policy is consistent with a state's constitution, it is legal in that state. In 1978 the Illinois and Kentucky legislatures passed textbook loan laws, while the Massachusetts Supreme Court struck down a similar law. Minnesota has perhaps indicated the course of future concern and litigation. There a federal court in 1976 upheld a textbook loan law in the absence of safeguards against the loan of sectarian texts. If safeguards were set up in the form of an inspection system, however, the result might involve excessive government entanglement, which was the basis for the 1971 ruling that invalidated Rhode Island's and Pennsylvania's aid statues.

Attempts to provide safeguards by limiting loans solely to books used by the public school system could prove to be a bad idea from a political standpoint. Local public school systems often need support at the polls from parents who utilize the nonpublic schools. In some communities public school systems cannot get levies passed in the face of any concerted opposition by those who do not use the public schools. (Opposition in Congress by advocates of parochial schools long held up the passage of federal aid legislation.) Therefore, good "public relations" dictates that nothing be done to antagonize the supporters of nonpublic schools.

What did Congress write into ESEA and how has the Department of Health, Education, and Welfare implemented the provisions? ESEA started out as a bill to assist youngsters of low income families who might be considered educationally deprived. It provided that any public school system desirous of a federal grant to aid the deprived must provide the same aid to children in nonpublic schools. This aid referred primarily to equipment "loans," textbooks and library materials, and supplementary services. Anticipating that such aid might conflict with state laws, Congress further provided that the federal government could by-pass state officials and give aid directly.

Auxiliary Services

Auxiliary services are those arrangements under which public school personnel are sent into nonpublic schools to provide such services as

remedial instruction in reading and arithmetic, guidance, and counseling. Title I of ESEA requires public schools to provide special educational services to nonpublic school children classified as educationally deprived. When providing operational guidelines for grant applications, the Department of Health, Education, and Welfare stated (Section 116,19d) that "Public school personnel may be made available to other than public school facilities. . . ."

The legislatures of New Jersey, Ohio, and Pennsylvania took the lead in enacting statutes that provide for auxiliary services. The courts have given such statutes a mixed reception, invalidating those provisions that fail to meet the tripartite test of purpose, effect, and excessive government entanglement, but doing so in a manner that has encouraged legislators to return to the drawing boards and enact modified legislation. New Jersey made direct grants available to nonpublic schools for use in purchasing materials and auxiliary services. Subsequently a federal district court unanimously ruled this statute unconstitutional. Pennsylvania provided services to cover the entire spectrum of nonreligious subjects and the court invalidated these because of the entanglement that would result if it had to assure that those persons providing the services did not "advance the religious mission of the church-related schools. . . ."

These rulings might be indicative of a trend in the Supreme Court's thinking, but its decision in mid-1977 on Ohio's aid program runs counter to such a trend. The Court ruled that speech, hearing, and psychological diagnostic services should be provided in the nonpublic schools. Remedial services, too, were permissible since they were not to be provided in the existing nonpublic school buildings. The Ohio law specifically stated, consistent with ESEA provisions, that the services might be provided in mobile units that presumably would be parked at the doors of the nonpublic schools. Ohio's demonstration of "how-to-do-it" may have established the model other states will adopt. Whether this will prove a satisfactory solution to state-church relationships in providing auxiliary education services remains to be seen.

Impermissible Aid

There are some forms of aid that do not meet the test of constitutionality. For example, the state may not pay for the maintenance or repair of

parochial school buildings or finance those clerical services it requires these schools to perform. Tax moneys cannot be used to pay any part of the salaries of nonpublic school teachers. Instructional materials and field trips cannot be provided at public expense. The state cannot purchase services from a parochial school (a practice attempted in Pennsylvania to get around other prohibitions), such as by reimbursing the school for teaching nonreligious subjects not offered in the public school. Federal legislation to relieve parents of part of their tuition expenses through tax credits, tuition grants, waivers, vouchers, or similar techniques is currently being considered. If passed, suits challenging the constitutionality of such legislation are likely to occur.

Shared Time

Programs in which students are enrolled concurrently in both the public and nonpublic schools are known as dual enrollment or shared time. They often involve the pupils taking the more expensive courses, such as industrial arts or lab science subjects, and the more "value free" courses, such as mathematics, in the public schools, thus relieving the parochial schools of a significant part of their financial burden. Courses in social studies and language arts, where the content can easily be directed toward religious goals, and courses in religion are taught in the parochial schools.

Shared time programs are usually distinguished from "released time" (to be discussed in the following chapter) by being involved with the regular academic subjects rather than solely religious instruction. These programs are found most commonly in Pennsylvania, Illinois, Michigan, Ohio, and Wisconsin. The total number of such programs has always been small, primarily because of practical problems. Getting pupils from one school to another necessitates coordinating parochial and public school schedules, creating larger time blocks to provide for movement between schools, and keeping additional records. Also most states allocate funds to school districts on the basis of full-time attendance, and thus the public schools may have to shoulder the financial burden caused by an influx of parochial school pupils for particular expensive courses. Finally, shared time arrangements tend to be inappropriate for the self-contained elementary school classroom.

As a result of the specific provisions in ESEA, shared time programs

should be attractive. Whether such programs can become a viable alternative in the coming decades may depend on the answers given to three other questions. First, can public school authorities work out scheduling arrangements for shared time programs that utilize their current instructional personnel and building facilities? Second, can nonpublic schools get heavily involved in shared time programs without seriously weakening their own claim to public funds? Finally, can the joint parochial/public school efforts to schedule shared time programs pass the "excessive entanglement" test?

Even if shared time programs should pass the constitutional test, they may in practice prove so unsatisfactory to parochial school authorities who want religious values to permeate all the content of a youngster's schooling, and to public school authorities who want to see their programs as building a sense of community among children from disparate backgrounds, that we shall see little of them in the future.

Religion and the Public Schools

Horace Mann and other nineteenth-century educational pioneers who sought to establish a system of public education that would provide a common experience for all children recognized that parents would be ill-disposed toward a school that promoted a religion other than their own. A school that would be attractive to all families had to challenge the religious practices of none. In the context of the dominant Protestant culture, the solution appeared to lie in replacing sectarianism with a generalized Christianity to which no one could object.

The "solution" was at best a partial one. It would never be satisfactory to those outside the Protestant fold, or even to many within it. But what educators could not accomplish, immigration and industrialization did. Immigration reshaped the religious composition of the nation. Industrialization focused attention on the need for technological skills, as did the democratic ideology on the need for civic knowledge. The growth in scientific knowledge and the popularization of the rationalist philosophy of the Revolutionary period unseated traditional religion as a prime determinant of human conduct. American society became increasingly secularized, and this was reflected in the schools.

Religious practices and ceremonies did remain, especially in homogeneous communities where they were so much a part of the cultural milieu as to be accepted without thought. Even in the urban areas they continued as ritual supported by tradition. The growth in both numbers and political influence of humanists, Roman Catholics, and Jews occasionally brought such practices into question. Challenges to school boards from religious groups were frequently successful, though not without giving rise to bitterness.

In the second half of this century a number of factors have contributed to a revived interest in having the schools be directly concerned with religion. The Depression years and World War II had turned the nation from a land of optimism to one of insecurity, and had left Americans groping for solutions to problems of crime, communism, and juvenile delinquency. Religion seemed to many to offer the solution. Court decisions banning some religious practices served to generate new efforts at promoting religion. Roman Catholics, who established their own schools to provide an environment pervaded by a religious atmosphere, also demonstrated an increased willingness to allow religion in the public schools, for many of these schools were now controlled by boards on which Catholics constituted a majority. Furthermore, over half the nation's Catholic youngsters were enrolled in public schools. At the same time, many Protestants, finding they could no longer take their religious domination of America for granted, turned to the public school for bolstering traditional religious views.

Bible Reading and Prayer

Discussing Bible reading and prayer together is appropriate, for in school practices the first usually preceded the second in the daily morning ceremony. Court decisions relating to one have an impact on the other.

The first decision by the U.S. Supreme Court concerned with these religious exercises was *McCollum* v. *Board of Education* in 1948. Though the case specifically dealt with religious instruction in the public schools, the justices' arguments and their decision banning such practices had far-reaching implications. The religious instruction was viewed as an aid to religion, hence in violation of the Establishment Clause of the First Amendment. Thus it did not matter whether student attendance was voluntary or mandatory. And it did not matter whether the aid was to one religion or to all religions. The ruling cast a doubt regarding the constitutionality of Bible reading and prayer recitation in the public schools.

The Court's reasoning provided the basis for decisions in 1962 and 1963 that ruled unconstitutional a prayer in New York and Bible reading statutes in Pennsylvania and Maryland. The Board of Regents of New York had developed a prayer for school use that read: "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us,

our parents, our teachers and our country." Since no particular religion was favored, and since participation was explicitly made voluntary, the Regents felt there was no constitutional issue. The Court, however, rejected the arguments of nonsectarianism and voluntarism, reiterating the principle that the Establishment Clause rendered aid to all religions as invalid. The basic question in the case was whether the prayer was a religious activity. Justice Black in speaking for the Court said since it expressed faith in God and sought His blessings, it was a religious activity.

The Supreme Court's ruling on Bible reading followed earlier contradictory lower court judgments. The practice had been judged unconstitutional in Pennsylvania but was upheld in Maryland. The Court found no difficulty in rejecting the claim that the school exercises were primarily secular rather than religious. The Bible was "an instrument of religion," and provisions in Pennsylvania legislation for alternative use of the Catholic Douay Bible further disproved the supposed nonreligious nature of the practices. Were statutes establishing such practices unconstitutional? Yes, said the Court, for they failed to meet the test that neither the purpose nor a primary effect of the legislation must be to advance or inhibit religion.

In *Engel* v. *Vitale* the Court banned state imposed prayer. In *Abington Township* v. *Schempp* it banned state imposed devotional exercises. Neither the Bible nor religion was removed from the public school; both were still appropriate for objective study. The Court's decisions were widely criticized, but it is evident that many who were unhappy with the Court's rulings attacked them without ever reading them. The judges on the Florida Supreme Court no doubt read the *Schempp* ruling but didn't believe it. In deciding two cases that sought to prohibit several religious practices in the schools, the Florida court not once, but twice, refused to render a judgment consistent with those of the U.S. Supreme Court, and the latter finally, in 1964, had to reverse the state court.

The reaction of Florida's highest court reflected an attitude to be prevalent throughout the country, and especially in rural areas of the South and Midwest. As several studies have revealed, many school systems openly ignored what the Court said was the law of the land. In Congress, legislators sought to outdo one another in attacking the Court and its ruling. Proposals to amend the Constitution, eventually totaling

over 100, were introduced to permit the proscribed religious exercises back into the public schools.

One proposed amendment, advanced by Congressman Becker of New York, got as far as hearings in the House Judiciary Committee. Opposition from Protestant and Jewish groups and lack of support from the Roman Catholic hierarchy resulted in the proposal's rejection. In 1966 and again the following year, Senator Dirksen of Illinois introduced prayer amendments. Both failed, although the first did get to a vote on the Senate floor. A roll call vote in the House of Representatives in November, 1971, failed by only 28 votes on an amendment bill. In 1973 Senator Birch Bayh of Indiana began what proved to be short-lived hearings on a prayer amendment. Other efforts thus far have met with a similar fate. While legislators come under various pressures from special interest groups seeking to legitimize prayer recitation and Bible reading, these pressures have yet to outweigh a reluctance to get embroiled in tampering with the First Amendment.

Today among the major churches there appears to be no full-scale effort to amend the Constitution to legalize Bible reading and prayer. In parts of the country religious exercises still remain in the schools, supported by the predominant local religious group. For the present, however, it appears that greater attention still is being given to the public treasury than to prayer in the public school.

Despite continuing attacks designed to raise popular support for legalizing religious exercises, the U.S. Supreme Court has maintained the position enunciated in its 1948 *McCollum* decision. It upheld a 1967 federal court decision striking down the practice in an Illinois kindergarten of reciting a prayer before midmorning milk and cookies. Even the omission of the word "God" from a revision of the prayer did not alter the thinking of either court. The Supreme Court also sustained a New York decision that parents could not compel school officials to permit prayers and a Massachusetts decision banning voluntary, student-initiated religious exercises in school. The Court also rejected an appeal by a New Jersey school board that wanted to operate a religious program before the opening of the school day. The machinery of the state — tax dollars and compulsory attendance statutes — cannot be employed to advance religion.

An issue related to the prayer controversy is a program, financed by the

Department of Health, Education, and Welfare, that provided Transcendental Meditation classes in a number of New Jersey schools. In late 1977 a U.S. district court ruled the program unconstitutional on First Amendment grounds. Meditation courses continue to exist in a small number of communities around the country, and some state legislatures have turned to "periods" or "moments" of meditation rather than prayer. Connecticut, New York, and Massachusetts passed laws that provided for "silent prayer or meditation."

Meditation legislation is an obvious attempt to circumvent the Supreme Court's rulings in *Engel* and *Schempp*. How it will fare in the courts, where surely it will appear, is problematic. The authority of the state cannot be used to advance religion, yet will courts find any other reasonable purpose for "meditation" laws? Perhaps a more fruitful course for legislators is to reread the Court's rulings, and do so more carefully. They may then conclude that statutes authorizing moments of meditation are unnecessary, for the Supreme Court never banned private prayer in the first place.

Religious Practices

The public schools have long sanctioned several practices of a religious nature, many of which, until recently, went unchallenged. In some communities these practices have become such a traditional part of the school scene it would take more than court decisions to abandon them. Activities such as Christmas celebrations and baccalaureate services have been woven into the fabric of many communities where, as with Bible reading and prayer, they are considered the essence of Americanism.

Although Christmas is supposedly a time of peace on earth and good will toward men, not to mention a season to be jolly, it can be fraught with danger for a school board. Board members and school administrators must recognize that the U.S. is not, in any legal sense, a Christian nation. Culturally it is a pluralistic society obligated by the Constitution to treat all systems of belief equally. It is, therefore, inappropriate for school leaders to accept religious celebrations because participation has been made voluntary or because youngsters of whatever religion enjoy a break from routine, even if to sing Christmas carols. As for the voluntary aspect,

there is no justification for making youngsters feel uncomfortable by requiring them either to join in songs they find objectionable or to single themselves out by being excused.

Pluralism in practice has received far from universal acceptance. Even in "pluralistic" America there remain pockets of religious homogeneity where a voice of protest is unlikely to be heard. It is only when challenged in the courts that the religious practices in the public schools of these communities are likely to be threatened. A school system can lessen the likelihood of successful challenges by organizing Christmas programs so that they do not constitute any segment of the regular school day, by avoiding the use of the Christmas theme for religious instructional purposes, by selecting as components of a program only material free of a religious emphasis, and by choosing activities with due regard for *all* people in the community.

Even these guidelines will not prove universally satisfactory. It could be pointed out that Christmas carols have their origin in church ritual, hence are by their very nature religious. It could also be noted that selecting activities representative of the total community could result in an observance pleasing to no one.

Some school boards may not hear directly from those who are displeased. To avoid hearing indirectly, they should try to recognize religious holidays in public schools without permitting *religious* celebrations. They might also find two New York court rulings instructive. In two New York communities the erection of Nativity scenes on public school grounds was challenged. Both courts ruled for the schools because there was no evident use of public funds, public employees were not involved in constructing the scenes, and the public schools were closed at the time of the display.

Baccalaureate services are similar to Christmas observances in terms of legal issues and the solutions acceptable to the courts. A vestige of the time when religion constituted an integral part of school instruction, baccalaureate services are a religious exercise held close to the time of the graduation ceremony. They have come under attack because they have a religious orientation, because the religious orientation is different from that of some graduating students, because student attendance has been required at the ceremonies, and because they are held in churches rather than schools. Court rulings appear to have been influenced by the school

board's stated purpose for the ceremony, by whether attendance was required or voluntary, and by the site of the exercises.

Released Time

In 1948 the Supreme Court handed down a ruling on a case brought by a Champaign, Illinois, mother who challenged the practice of priests and ministers coming into the public schools during the regular school hours and using the classrooms for religious instruction. Vashti McCollum had lost in every lower court, but her persistence finally brought the case to the Supreme Court. It found that the Champaign practice was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." This was clearly in violation of the First and Fourteenth Amendments on several counts. Tax-supported property was being used, time allotted by the state for compulsory secular education was being used, and finally, the administrative resources of the public school system were being employed to further religious instruction.

This case, *McCollum* v. *Board of Education*, brought into question one form of released time. Such programs actually have been in existence for over half a century, and the arrangements usually have been free of legal difficulties. The label *released time* has been applied to three different types of programs, more appropriately known as released time, dismissed time, and shared time. The last of these was discussed earlier as a form of aid to nonpublic schools whose pupils are enrolled in both the parochial and public schools.

In its more limited sense, released time refers to arrangements between the public schools and church authorities whereby pupils leave the public school for a specific time period of religious instruction. This instruction usually comes during the latter part of the school day, but some programs utilize other times. Pupils who do not participate in religious instruction are required to stay in the public school.

Four years after *McCollum*, the Supreme Court upheld a New York City program that differed from the Champaign practices in that instruction was held away from public school premises and during the last part of the school day. Youngsters were released upon written request of a parent. The churches reported weekly to the public schools on the attendance of

those released for religious instruction. The Court claimed that, in contrast to the situation in *McCollum*, all costs were paid by the churches. The majority of the justices chose to ignore testimony that pupils were pressured to attend the religion classes and concentrated on the written program as described in the regulations of the board of education. In finding the New York program constitutional, the Court thus gave approval to programs that were not held on public property and that involved public school personnel in only limited ways.

The Supreme Court had an opportunity early in 1976 to reconsider released time in light of practices in Harrisonburg, Virginia, where a local church organization stationed trailers outside the elementary schools and used them for teaching religion during the regular school day. The public school teachers were responsible for taking the pupils to the trailers and for coming to get them at the conclusion of the religious instruction. The first court to rule on these practices found them unconstitutional. An appeals court, however, followed the reasoning of the Supreme Court in the New York case *Zorach* v. *Clauson* and overruled the lower court. The refusal of the Supreme Court to accept the case thus meant that the constitutionality of the program was upheld. In light of the earlier *Zorach* decision it can be concluded that, subject to the *McCollum* limitations, public schools can assist in religious instruction through released time.

Vocal critics of released time continue to question whether the state can, in the words of Justice Black, "use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery." These critics might be somewhat more willing to permit a second form of released time, namely, dismissed time. Dismissed time involves ending school early once a week. School closes; all pupils are dismissed. Those children whose parents wish them to proceed to religion classes may do so. Whether or not they attend is a matter to be worked out among them, their parents, and a church. Because the public school has absolutely no involvement in the decision, no constitutional question can be raised.

Church groups that work to establish released time programs evidence no interest in dismissed time. The reason should be obvious. Without the state's compulsory education powers serving to round up the youngsters and assure their attendance, the religion programs would reach a far

smaller audience. It is reasonable to suggest that released time programs would probably fail were it not for the coercive arm of the state. Thus dismissed time programs have no appeal to churches eager for the opportunity to promote the faith.

Public school responses to released time are reflective of the diversity of outlooks in the country. Some school administrators have actively promoted religion programs by making announcements over the school's public address system, by allowing church representatives to promote their programs in the schools, or by distributing forms to be used in applying for early release. Others have sought to avoid involvement. One school administrator recently made the news when he decided that a statute saying he "may" release students early did not mean he was obligated to do so; and in Washington state a school board that authorized a released time program in the winter of 1978 changed its mind before the year ended. In a time of greater willingness by citizens to challenge acts of questionable constitutionality, we can expect extremes of practice to be brought to the courts with reminders of the *McCollum* decision.

Religious Opposition to Public School Practices

Some aspects of public schooling that do not specifically promote religion have nevertheless become the focus of religious controversies. The parental claim to free exercise of religion has been the basis for two notable challenges to the public schools. In one situation, Jehovah's Witnesses refused to permit their children to salute the American flag; in another, Amish parents refused to send their children to high school. The Supreme Court ruled on the flag ritual in two decisions handed down in the early 1940s. Three decades later it ruled on noncompliance with compulsory attendance laws.

The flag salute cases arose as a result of the expulsion from school of children of Jehovah's Witnesses for refusing to take part in the flag ceremony. The Witnesses objected to saluting the flag on the ground that it was forbidden by the Bible, which, according to their interpretation, forbids worship of images (i.e., the flag). In 1940 the Supreme Court in *Minersville School District* v. *Gobitis* upheld the practice of the pledge to the flag as a reasonable exercise of the authority of the school system to enforce regulations of a general secular nature that were designed to promote national unity. Three years later, however, in *West Virginia* v. *Barnette*, the Court changed its mind. To promote patriotism through study of our history and government is quite acceptable, said the Court, but the practices challenged by the Witnesses involve stating a belief and declaring a particular attitude of mind. "[No] official . . . can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith. . . ."

While the state, then, can control schools because the latter serve purposes essential to the welfare of the nation, the ruling in *Barnette* makes

clear that there are limits to this control. It is not absolute; it cannot interfere with the exercise of basic rights such as the free exercise of one's religion. But neither is religious free exercise an absolute right. Thus when Jehovah's Witnesses challenged the flag salute ceremony with the argument that the state could require such a practice only if it could show "an overriding public necessity," the Court in *Gobitis* found that there was such a necessity. The practice contributed to the promotion of civic values necessary to the survival of society. But in *Barnette* the Court decided that flag salutes had a minimal effect on the public welfare, and thus ruled on behalf of the Witnesses.

The courts have had to determine under what circumstances the free exercise claim should prevail over the state's interest in the education and welfare of its young citizens. Through a series of decisions, the Supreme Court has modified and reshaped the criteria by which it determines whether to uphold or reject a free exercise claim. By the 1970s its reasoning held that only where the state had the more compelling interest would a free exercise claim be overruled. The Court justified a compulsory secular education as necessary to a democratic society. The compulsory aspect was intended to assure the promotion of an intelligent citizenry. The secular aspect, consistent with the Bill of Rights, avoided religious concerns and thus removed any threat to a family's particular sectarian views.

As for the public schools, they serve a fundamentally political purpose by preparing people to make their contributions to the community. In a time of divisiveness they can function to promote the ever dwindling unity within America. While nonpublic schools may promote the values of their own particular clientele, the public schools aim to promote the general values of the entire nation – civic unity and a democratic society. Nonpublic schools may also support this general welfare, hence the 1925 *Pierce* decision upholding the right of private schools to provide programs consistent with state standards and compulsory schooling laws.

In *Wisconsin* v. *Yoder*, which was decided by the Supreme Court in 1972, the state of Wisconsin argued that requiring school attendance up to age 16 assured the community that its young people would be politically and economically competent to assume a meaningful place in society. The Court rejected that argument precisely because it felt Amish children

would grow up to live in an Amish society. A public high school education would be of little value in an Amish community. Since the Amish had prospered in the absence of post-elementary schooling, the Court found no basis for the state's claim that their welfare required the extra schooling. It ruled, therefore, that the Amish parents could not be held to Wisconsin's compulsory attendance law requiring them to send their children to school until age 16.

Because it constituted a successful assault against the long-established state laws on compulsory schooling, the *Yoder* decision has raised some fundamental questions concerning the future of the American educational enterprise. Questions with state-church ramifications merit brief examination here. First, the Amish sought a "free exercise" exemption from the high school grades only. This the Court granted, without providing a clue as to what might have been the ruling if the requested exemption also applied to the elementary grades. There is nothing in the Court's decision to support the view that another religious group could come along and successfully claim exemption from the first eight years of schooling.

Does the exemption from high school for the Amish mean that the Court attributes one set of purposes to secondary schooling, and that these purposes may be less crucial to the welfare of society than a different set assigned to the elementary school where the state interest in their universal fulfillment may be more compelling? The Court, having neither defined "education" nor detailed the specific purposes of each of the two levels of schooling, has only partially answered the question. Any exemption is likely to minimize the role of the school in promoting a sense of national community. If greater emphasis is thereby given to the "free exercise" rights of varied groups, the public school will serve no purpose more important than that which any school can serve. Nonpublic schools may instruct for specific social ends other than those of uniting pluralistic people and developing civic and economic competencies. If their purposes, in the eyes of the courts, are regarded as just as valid as those of the public schools, then such a recognition could become a justifiable basis for a claim on the public treasury.

Another basic concern is raised with the Supreme Court's *Yoder* decision. Hitherto the courts had carefully avoided inquiry into the judgment of particular religious beliefs. (Indeed, the First Amendment would seem

to require such avoidance.) The Court, however, went a step further and noted that it would not have considered the Amish claims had they been advanced in the absence of a traditional affiliation with a particular church. Only because they were members of a long-standing religious group did the Amish have a telling argument. Such actions by the Court appear incompatible with the trend in its thinking over the past three decades. Justice Jackson, dissenting from a Court decision in the mid-1940s, criticized the "business of judicially examining other people's faiths." In the ensuing three-and-one-half decades, courts have conveyed the idea that under the Constitution, the test of religion is "belief," not church affiliation.

In exempting the Amish children from high school attendance, the Court was not ruling on their free exercise of religion. The Court, except for Justice Douglas, ignored the issue of children's rights. The state of Wisconsin argued the rights of the child – the right to get an education that would better enable him to make his way in the world. The Supreme Court, however, was attending to the rights of the Amish parents – the right to raise their children as they wished. Thus, in still another way, *Yoder* broke with a trend. The Court, which had usually protected children from parents whose religious beliefs resulted in denying youngsters medical care, for example, apparently did not feel such rulings provided any precedent for protecting a child's right to secondary schooling. Or maybe the Court saw little similarity between essential medical care and nonessential attendance at high school.

The Court's rulings on behalf of the Jehovah's Witnesses and the Amish are indicative of the constitutional protection for, and indeed encouragement of, pluralism in American life. Such judicial rulings should not, however, be construed as an open invitation by critics of the public schools to launch an assault on the concept of a publicly supported and controlled institution designed to provide a common educational experience for all American youth. The free exercise of religion is a right to which the Court has given greater respect, although in the educational realm it is respect for the parents' free exercise, not the children's. The ruling in *Yoder* also indicates an at least temporary judicial retreat to a narrower interpretation of "religion" and thus lends no encouragement to adherents of newly created sects who might use the Court's decision to

seek public support for their alternative schools. The compelling interest of the state remains a decisive factor, even though the burden of proof has been shifted to the government. The *Barnette* and *Yoder* decisions reveal a judicial solicitude for those seeking, on religious grounds, exemption from certain public school practices. Such a concern must surprise those who accuse the Supreme Court of promoting secularism in American society.

Religious Influences on the Curriculum

The broadening scope of the public school curriculum has resulted in numerous legal challenges to specific subjects or topics. Of the objections raised, those of a religious nature have been notably prominent. Over the past century few subjects have managed to escape criticism. Physical education has been challenged on religious grounds because of the dress required of participating students. Dancing was objected to, as conflicting with religious beliefs. Biology instruction that has included the theory of evolution has generated religious opposition. In the area of language arts, books portraying certain religious groups in an unfavorable light or containing language considered offensive have been criticized.

By no means is all the opposition religion-based, nor does it emanate solely from religious groups. But the criticism that does come from these sources often results in heated controversy because the conflict involves fundamental beliefs. Dissatisfaction with the school's practices is often made more acute by the feeling that the "educational establishment" seeks to control the curriculum and prevent community participation in decision making. The religious impact is often felt at the local level, as was the case in the violent controversy over literature textbooks in the Kanawha County, West Virginia, schools. (Franklin Parker has admirably summarized this particular conflict in Phi Delta Kappa's fastback No. 63 *The Battle of the Books: Kanawha County.*) Religiously inspired efforts to have certain materials removed from schools are usually made at the local level. Attempts to insert materials with a religious viewpoint are more noticeable at the state level.

Fundamentalist religious pressures were responsible for state laws forbidding teaching the theory of evolution. One such statute in Tennessee gave rise to the famous trial of John Scopes in 1927 for violating that

state's so-called "monkey law." Scopes was found guilty, but his conviction was later overturned on a technicality. More recently, the U.S. Supreme Court heard the case of a teacher in Little Rock, Arkansas, who found herself in the legal predicament of being expected to teach from a biology text which, in violation of state law, discussed evolution. The Court's 1968 decision in *Epperson* v. *Arkansas* invalidated the Arkansas anti-evolution statute and sounded the death knell for legislation that was clearly designed to promote a particular religious viewpoint.

Unable to keep evolution out of the textbooks and the schools, anti-evolutionists have turned to seeking, in effect, "equal time," or more appropriately, "equal space." They have promoted the publication of materials presenting the Biblical theory of creation, and have sought adoption at local and state-wide levels. But in the summer of 1976 a three-year-old Tennessee law requiring biology textbooks to provide for discussion of religious theories of creation was overturned by both the state's supreme court and a U.S. district court. In the spring of 1977 another challenge, this time in Indiana, culminated in a court ruling that a textbook adopted by the state's textbook commission was not religiously neutral, and because of its obvious orientation toward Biblical theory, tended to promote a particular religious viewpoint. It would appear reasonable to conclude, therefore, that instruction in the Biblical view of creation is not constitutionally defensible. Nevertheless, the practice is likely to continue where supported by local religious values.

Other topics in the curriculum that can be potential sources of community friction are moral education, sex education, and death education. The schools have always been involved with moral education, at least indirectly, but earlier efforts are increasingly being replaced by curricula specifically aimed at combatting some of the current problems facing society. Increasingly sophisticated strategies for introducing new content are designed to minimize conflict. These include programs to inform and gain the approval of parents by involving them in decision making and the creation of regional or national agencies, such as the Sex Information and Education Council of the U.S. (SIECUS), which operate as sources of information, serve as public forums, and promote communication between all concerned parties. Even where problems do become acute, the nature of the disagreement may not always constitute a state-church issue.

How moral education can become a state-church issue is shown by the course of events in the Camden-Frontier School District in southern Michigan. For over three decades, a Kalamazoo-based Rural Bible Mission has operated a "moral education" program in the kindergarten and elementary grades during regular school hours. This is a classic example of what is likely to occur in geographically diverse parts of the country when once homogeneous communities, long accustomed to engaging in practices that reflect a single set of values, find those practices brought into question and, if necessary, challenged in the courts. The school board was first asked to end the monthly classes, which consisted of Bible stories being used to teach moral standards. The board declined to comply. What could be wrong with a program teaching moral values in a manner approved by the community? When the state's attorney general was no more successful in obtaining a voluntary halt, the issue was taken to court where the program was banned as a violation of the federal Constitution. It was also found to be in violation of the Michigan constitution and state school code.

In its February, 1978, decision on the Camden-Frontier moral education program, the Michigan court indicated that the instruction could be conducted on a released time basis such as was done in other southern Michigan school districts. The judge made mention of the availability of a nearby church in which quarters might be obtained for released time use and commended the efforts at moral instruction. The court in no way sought to ban such instruction, but rather to bring it into compliance with the law.

In developing a program of moral education the difficult task becomes one of convincing the community that the school can be neutral on issues of religion without being neutral on issues of morality. Nevertheless, the principle remains that in a nation whose constitutional stance is that of religious neutrality, no religious group should gain control of a public school program, and no program should promote any religious point of view.

Opposition to sex education programs has been prompted in large part by concern that young people will learn facts about sex and reproduction without acquiring a framework of morality to shape their behavior. It is not just the existence of some framework that will satisfy most critics,

however, for they desire one compatible with their own system of values. Courts are likely to lend a sympathetic ear to pleas that sex education not be taught to children in a manner inconsistent with parental values. This has resulted in school systems offering sex education programs on a voluntary basis, with the decision of whether or not to participate resting with a pupil's parents. Such a stance is consistent with the pluralistic nature of American society, and in the absence of any compelling state interest to the contrary (a test previously discussed in relation to compulsory schooling), it is likely to be widely followed.

Even voluntarism has been far from universally accepted. Thus, we find legislation banning discussion of birth control in sex education programs and court suits seeking to terminate such programs. These cases usually are argued on the ground that sex education in the public schools violates parents' religious liberty and infringes upon their authority. The claim of the exclusive right of the parent to provide sex education has not been upheld where the courts have viewed sex education as a public health measure. Recent rulings in Maryland (1969), New Jersey (1971), Michigan (1974), and California (1975) have upheld sex education programs against challenges of unconstitutionality. The reasoning behind these decisions is well summarized in the words of the California Court of Appeals: "[The] program areas that the parents challenge are simply not religious in nature but primarily involve education and public health."

Another potentially troublesome curriculum topic is in the area of teaching about religion. Advocates of religion studies have taken great pains to distinguish between the teaching *of* religion and teaching *about* religion. Organizations such as the National Council on Religion and Public Education were encouraged by statements, such as in the *Schempp* ruling, that noted the role religion has played in our history and its importance in our lives. Such organizations in their programs have sought to adhere to judicial restrictions against promoting the views of one or more religious denominations. To the extent they have succeeded, problems associated with teaching about religion may be more pedagogical than legal.

The distinction between teaching religion and teaching about religion is ostensibly the distinction between promoting a particular set of religious beliefs and providing some descriptive information about particular

religions. "One's education is not complete without a study of comparative religion or the history of religion," noted Justice Clark. And he added, "The Bible is worthy of study for its literary and historic qualities . . . when presented objectively as part of a secular program of education." Courses, units, and other forms of individual and class activities have thus been developed and offered in numerous public school systems. One common approach is an examination of major concepts in Protestantism, Roman Catholicism, Judaism, Islam, and a few Far Eastern religions. Another and similar treatment uses a historical approach to a study of these religions, usually beginning with an introduction to "primitive" beliefs. Still other approaches center around "the religious dimension" as found in literature and hypothetical situations requiring ethical decisions.

Problems in teaching about religion are inherent both in the nature of the content and in the methods used in the classroom. Many of them, such as adequate preparation for teachers and development of instructional materials, are common to other school studies. Others tend to surface where any controversial subject is being taught. By what means can a teacher prevent his or her own biases from coloring the material being studied? Can we expect to teach about religion in an unbiased way when we cannot even teach history and literature that way? American history is not taught with a view to having youngsters judge the correctness of our policies over the past two centuries; English and American) literature is not studied so that pupils can decide what is good writing. Just as the study of communism in American schools is oriented toward making clear the superiority of our capitalist system, many programs designed to teach about religion are filled with pro-Christian and pro-traditional religion propaganda.

By no means are all of the problems pedagogical, however. Some aspects of teaching about religion may result in state-church issues. If the Bible is studied as literature (and Justice Clark says it constitutionally can be), how will a school system cope with the parental challenge that the Bible is the literal word of God and should not be subject to the common forms of literary criticism? What might happen to a teacher whose class, as a result of a comparative study of many religions, concludes that rather than God creating man in His image, man has created God (or gods) in

man's image? Will schools (and communities) permit not only a study of religions as forms of human response to the conditions of life, but also a comparative study of organized religion and other forms of human response to these conditions? Will religion be studied as a sociological phenomenon and as a psychological phenomenon; and if it ever is, will those advocating a supernaturalistic interpretation be granted equal time?

The dilemma for school systems should be quite evident. Even assuming schools can distinguish between teaching religion and teaching about religion – and the assumption is at best tenuous – in an area as sensitive as religion, community concern is likely to be greater than normal, bringing with it greater than normal pressures on school systems. The result may be programs of a relatively unsophisticated nature that, in an ecumenical spirit, expose youngsters to the basic beliefs and practices of the major institutionalized western religions and the quaint and different features of some eastern faiths. This would probably satisfy a majority in the community and, if ever challenged, would "pass muster" in the courts (to use one of the Supreme Court's own phrases). But it is also reasonable to assume that parents whose ethical orientation falls under such labels as *humanism, ethical culture, agnosticism,* and even *atheism* – all of which constitutionally merit equal protection under the law – will employ the usual political and legal channels to alter or terminate programs teaching about religion. Adherents to fundamentalist and traditional views of religion can be expected then to use the same channels for the same purposes.

If experience is any indicator, few controversies will find their way into court. Most will be resolved, or at least fought out, in the community and its schools. School policy makers, faced with proposals to teach about religion, will have to decide whether these new programs would be worth the tension, animosity, and discord their adoption might generate.

The Constitution and the Supreme Court

Some readers may regard the foregoing thoughts as reflecting unwarranted pessimism. They might point to communities where youngsters study "about" religion and where other practices discussed in these pages occur with no evidence of religious conflict or disagreement over state-church issues. They might further note that the U.S. has been spared much of the religious hostility and persecution evident in European history. Perhaps we can attribute what religious freedom most (but by no means all) Americans enjoyed earlier in our history to the availability of pockets in the wilderness where people of like mind could live undisturbed by others.

Much of our nation's success in providing religious freedom is owed to the wisdom of the framers of the Constitution and to the efforts of the Supreme Court. Those who wrote the Constitution did so in light of past conflicts in Europe, which they desired to avoid; in response to a time of building one people out of many; and on the basis of aspirations for a future that would afford greater liberty and justice for all citizens. After drawing up the document that would serve as the fundamental law of the land, they added a Bill of Rights, seeking to make more explicit the freedoms to be guaranteed by the Constitution. The rights with which the framers were concerned have resulted in their creating an exceptional document notable for its continued applicability in the face of social change and for the way it has protected Americans in the exercise of their freedoms.

In light of what has come of written constitutions in other countries, it is noteworthy that the first 10 Amendments have weathered two centuries without alteration. Through a judicious reliance on general principles

rather than on trying to anticipate specific constitutional issues that might arise, the authors of the Constitution produced a document that may leave some analysts in doubt as to its precise meaning but none as to its general intent.

The first words of the first of the rights guaranteed to Americans are, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." In a written document primarily concerned with placing limits on the powers of government, the framers of the Constitution first attended to restricting government influence in religious matters. European experience taught them the dangers of becoming involved in the seemingly interminable conflicts between competing faiths; the experience in colonial America taught them the dangers of an alliance between church and state. It was not just impartiality that was called for; history dictated neutrality.

The Constitution set down the rules of the game. It did not establish these rules; the American experience had done that. It merely codified them. The churches should not be instruments of the state; the machinery of the state must not be used to advance the interests of the churches. Churches must be free to pursue their religious goals independent of government interference; the state must be able to pursue its ends in matters of public policy free from ecclesiastical pressures.

Passing judgment on the religion clauses of the First Amendment involves responding to two questions: What has been their effect on the churches? What has been their effect on religious freedom? The answers are hard to dispute. In few areas of the world are there so many denominations and sects enjoying public respect and the support of significant numbers of adherents. Operating largely without state support, these churches demonstrate a vitality and prosperity unequaled in the world today. The evidence from the shared experiences of the diverse American peoples clearly indicates that in matters involving the churches and the state, the Constitution has served us very well.

But what of the conflicts destined to arise in a pluralistic society between differing religious viewpoints and between the sectarian and the secular? In our changing political climate, persons who reject the fundamental premises on which state-church separation rests have obtained considerable political power, while at the same time dissenting minorities

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without such power are increasingly demanding and receiving a favorable hearing in the courts. Our nation has entered a period in its history where diversity in life style and challenges to long-accepted ways of living are flourishing as never before. We can thus expect an increase in dissent and community conflict. Most disagreements will be resolved at the local level. Some will be taken to the courts.

Not only did our nation's founders produce a remarkable Constitution, they also created a judicial system presided over by a Supreme Court that has evolved into an extraordinary institution. The nine justices of the Court exercise broad powers of closure of legal issues – power to rule on the actions of states, of Congress, and of the Presidency itself. To them, sooner or later, come all state-church issues, and they determine what, in those first words of the First Amendment, the Constitution means.

The Supreme Court is not all-powerful, and it does not always have the last word. (Witness efforts in Congress to amend the Constitution in order to undo the Court's prayer decisions.) Its rulings may be ignored, as, for example, by schools that continue to have Bible reading and prayer. Its decisions may be temporarily nullified by state legislatures that speedily edit and re-enact financial aid statutes the Court has outlawed. The justices often disagree with one another. On occasion, as in the flag salute cases, they change their collective mind. At times the logic of their arguments is mystifying, and from ruling to ruling consistency appears to be lacking. The extent and the nature of their work result in the wheels of justice grinding slowly. Every decision displeases somebody, and every decision is proclaimed in public where it can be battered by the winds of criticism.

Despite, or perhaps because of these conditions, the great majority of the American people have come to accept the Supreme Court as the final arbiter of our disputes and controversies, including those on issues involving church and state. Because in pluralistic America there are many churches but only one state, we have come to accept the Court's word as final because the justices reach their decisions on the basis of the law rather than political expediency. The inconsistencies that critics find in Supreme Court rulings result from a concern far more important than consistency. The Court must provide not just equity, but justice. The Court exempted the Amish from compulsory high school attendance ex-

plicitly because of their religion. That decision was, logically, an unconstitutional establishment of religion. But in light of the American experience with the Amish, did anyone really expect the Supreme Court to rule for the state of Wisconsin!

One can approve of the Court's emphasis on the criterion of justice without necessarily agreeing with the specific ways in which it has been used. Decisions showing a scrupulous regard for beliefs of minorities who have found public school involvement in religious practices objectionable can only serve to strengthen religious freedom in this country. Such decisions cannot guarantee freedom from social disapproval, but they can provide a moral and legal barrier to the use of the public schools in ways that infringe upon the free exercise of religion. The several major religious groups in this country enjoy the greatest of freedom to live by their beliefs. The interests of American society are ill-served when they seek to practice their religion where and when it presents an imposition on those of different belief or no belief.

When the first public schools were founded over a century ago, they were intended to provide a common educational experience for all children. They were to be operated under the direction of representatives of all the people because they were intended to serve all the people. I believe that the welfare of this nation depends on the existence of a free public school system available to serve *all* children. Upholding the U.S. Constitution and its interpretation by the Supreme Court regarding church-state issues in education provides the best assurance that such a system will prevail.

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